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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 888

JOHN V. BOLAND CONSTRUCTION COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of the Court of Claims granting defendant's motion for summary judgment (Pet. App. 1a) is unreported.

JURISDICTION

The order of the Court of Claims was entered on January 19, 1962. The petition for a writ of certiorari was filed on April 18, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether petitioner's failure to file a timely appeal before the Armed Services Board of Contract Appeals, as required by the "Disputes" clause of its

contract, precludes judicial consideration of its claim for extra compensation.

2. Whether petitioner's failure to file its claim until more than 7½ years after it completed, and the government accepted, the work called for by the contract barred this suit against the United States in the Court of Claims.

STATUTE AND CONTRACT PROVISIONS INVOLVED

The pertinent provisions of 28 U.S.C. 2501 and Contract No. DA-25-066-ENG-480 are set out in the Appendix, *infra*, pp. 7-11.

STATEMENT

On August 17, 1950, petitioner and the United States Army Corps of Engineers entered into contract No. DA-25-066-ENG-480 for the construction of a weather station and certain appurtenant facilities at Kirksville, Missouri (Pet. 6). Notice to proceed under the contract established June 13, 1951, as the completion date. Subsequently, a supplemental agreement was entered into whereby the Army was able to assume beneficial occupancy of certain buildings and facilities 90 days prior to the completion date (Pet. 6-7). For this advance in the beneficial occupancy, the government agreed to pay the sum of $114,752 (Pet. App. 29a). Beneficial occupancy was assumed on March 19, 1951, and the project was accepted as complete on September 10, 1951 (Pet. 7).

On May 11, 1953, petitioner filed a claim with the Corps of Engineers for $265,836.40 as extra compensation under the delays and changes clauses of

the contracts (App., *infra*, pp. 7–10).[1] The claim was denied by the contracting officer on October 2, 1953, and an appeal was taken to the Corps of Engineers Claims and Appeals Board on October 27, 1953 (Pet. 7–8). Thereafter petitioner revised and increased its claim to $272,063.07. After investigation and the issuance of findings of fact, the entire matter was forwarded under the "Disputes" article of the contract (Art. 6, App., *infra*, pp. 10–11) to the Corps of Engineers Claims and Appeals Board for decision on August 21, 1956. Hearings were held before that Board on November 27 and 29, 1956, in St. Louis, Missouri, and on June 19, 1958, the Board denied all but one item of the claim on the ground, *inter alia*, that petitioner had failed to protest or file a claim in a timely manner as required by the contract.[2]

On July 21, 1958, petitioner, purporting to proceed in conformity with Article 6, served a notice of appeal from the Engineers Board to the designate of the Secretary of the Army, the Armed Services Board of Contract Appeals. The government moved to dismiss the appeal as untimely since it was not taken within the time limit provided by Article 6 of the contract. On November 26, 1958, after reviewing the dates and determining that the appeal was not timely,

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[1] Prior to this date, petitioner had filed a request for relief under Title II of the First War Powers Act, 55 Stat. 839. The request was denied.

[2] The Engineer Claims and Appeals Board observed that "[t]here is little doubt that such failure of [petitioner] to notify the Government of claim was prejudicial in that it did not have the timely opportunity to records events and costs, preserve testimony and proof, act to avert or mitigate the costs and consequences or otherwise protect its interests" (Pet. App. 39a).

the Armed Services Board of Contract Appeals dismissed petitioner's appeal.

Thereafter, on May 4, 1959, petitioner brought this suit in the Court of Claims to recover additional expenses for extra labor, material, and costs incurred in performing work under the contracts. The Court of Claims dismissed the petition on the ground that petitioner failed to exhaust its administrative remedy when it neglected to take a timely appeal from the decision of the Engineers Board and that its claim was barred by the statute of limitations.

ARGUMENT

The Court of Claims was clearly correct in deciding that petitioner failed to exhaust its administrative remedy and that its claim was barred by the statute of limitations. The decision of the Court of Claims is in accord with this Court's rulings in *United States* v. *Holpuch Co.*, 328 U.S. 234; *United States* v. *Blair*, 321 U.S. 730; and *United States* v. *Callahan Walker Construction Co.*, 317 U.S. 56. Accordingly, there is no occasion for review by this Court.

1. Petitioner argues that its claim is a damage claim outside the scope of the "Disputes" clause since "[t]he only provision of the contract which vests authority of decision in the administrative boards is Article 6, * * * and it expressly limits such decisions to disputes concerning *'questions of fact'* (Pet. 10). Petitioner's argument is based upon the theory that there was an implied agreement, fixed by law, that the government would pay petitioner for extra work and costs and that recovery should be allowed

in quasi-contract based upon the principles of unjust enrichment. The dispute, however, is patently a factual one and petitioner cannot circumvent the effect of its failure to file a timely appeal before the Armed Services Board of Contract Appeals by labeling its action in the Court of Claims as based upon an implied equitable agreement. It is plain that petitioner not only could have presented, but in fact did present, the same claim under the "Disputes" clause of the contract. "This mechanism * * * [of the "Disputes" clause] is exclusive in nature. Solely through its operation may claims be made and adjudicated as to matters arising under the contract." *United States* v. *Holpach Co., supra*, 328 U.S. at 239–240.

No more substantial is petitioner's claim that "[The contracting officer] * * * advised * * * [it] that because of the * * * work any formal request for an extension of time as prescribed by the contract would be denied" (Pet. 9). There is no evidence that a timely appeal to the Armed Services Board of Contract Appeals would have been futile or prejudicial. See *United States* v. *Blair, supra*, 321 U.S. at 736. In the absence of some clear evidence that the appeal procedure is inadequate or unavailable, that procedure must be timely pursued and exhausted before a litigant can be heard to complain in a judicial proceeding. *United States* v. *Holpach Co., supra*; *United States* v. *Callahan Walker Construction Co., supra*. See also *Henry E. Wile Co.* v. *United States*, 144 C. Cls. 394.

2. Petitioner also insists that it filed its claim within six years after it first accrued (see 28 U.S.C. 2501, App. *infra*, p. 7), since "[no] final determination was made by the contracting officer and no cause of action accrued until his decision denying the claim was rendered on October 2, 1953" (Pet. 12). But, if the question to be decided were, as petitioner contends, one of law, with respect to which Article 6 did not apply, and if the contracting officer was therefore without authority to decide it, certainly no cause of action could have accrued as a result of his adverse decision; rather, the cause of action could have accrued only at the completion of the contract, which was no later than September 10, 1951, more than six years prior to the filing of the suit.[3] Accord, *Acorn Decorating Corp.* v. *United States*, 146 C. Cls. 394.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1962.

[3] If, as we believe clear, petitioner's damage claim raised issues of fact within the Disputes Clause (Article 6), it forfeited its rights, as noted *supra*, by its failure to take timely administrative appeals.

APPENDIX

Section 2501, Title 28, United States Code, provides in pertinent part:

> Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

Contract No. DA-25-066-ENG-480 in pertinent part provides:

> ARTICLE 3. *Changes and Extras.*—The Contracting Officer may at any time, in writing, and without notice to the sureties, order extras or make changes in the drawings and/or specifications of this contract providing such extras or changes are within the general scope thereof. If such extras or changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. Any claim of the Contractor for adjustment under this article must be asserted in writing within 30 days from the date the extra or change is ordered: Provided, however, That the Contracting Officer, if he determines that the facts justify such action, may receive and consider, and, subject to such approval as the head of the department may require, adjust any such claim asserted at any time prior to the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in Article 6 hereof. But nothing provided in this article shall excuse the Contractor from proceeding with the prosecution of the work.

ARTICLE 4. *Changed conditions.*—Should the Contractor encounter, or the Government discover, during the progress of the work subsurface and/or latent physical conditions at the site materially differing from those shown on the drawings or indicated in the specifications, or unknown physical conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications, the Contracting Officer shall be notified immediately in writing of such conditions before they are disturbed. The Contracting Officer shall thereupon promptly investigate the conditions, and if he finds that they do so materially differ, the contract shall, subject to such approval as the head of the department may require, be modified to provide for an equitable adjustment in contract price and/or difference in time resulting from such conditions. If the parties fail to agree upon the adjustment to be made, the dispute shall be determined as provided in Article 6 hereof.

ARTICLE 5. *Delays—Damages.*—(a) Termination for Default.—If the Contractor refuses or fails to prosecute the work, or any separate part thereof, with such diligence as will insure its completion within the time specified in the contract, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the Contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise, and the Contractor and his sureties shall be liable to the Government for any excess costs occasioned the Government thereby, as well as for liquidated damages for delay, as fixed in the specifications or accompanying papers, for such reasonable time as may be required to

complete the work, or if liquidated damages are not so fixed, the Contractor and his sureties shall be liable to the Government for any actual damages occasioned by such delays. If the Contractor's right to proceed is so terminated, the Government may take possession of and utilize for completing the work such material, appliances, and plant as may be on the site of the work and necessary therefor.

(b) Damages for Delay.—If the Government does not terminate the right of the Contractor to proceed, as provided in this article, the Contractor shall continue the work, in which event he and his sureties shall be liable to the Government, in the amount set forth in the specifications or accompanying papers, for liquidated damages for each calendar day of delay until the work is completed; or if such liquidated damages are not so fixed, any actual damages occasioned by the delay.

(c) Time Extensions.—The right of the Contractor to proceed shall not be terminated as provided in this article, nor the Contractor charged with liquidated or actual damages, because of any delays in the completion of the work due to causes which he could not reasonably have anticipated and which were due to causes beyond his control and without his fault or negligence, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, either in its sovereign or contractual capacity, acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargo, and unusually severe weather, or delays of subcontractors due to such causes; provided however, that the Contractor shall promptly notify the Contracting Officer in writing of the causes of such delay. Upon receipt of such notification the Contracting Officer shall ascertain the facts and the extent of such delay and, if in his judgment the facts so justify, shall extend the

time for completing the work commensurate with the period of excusable delay. The Contracting Officer's findings of fact thereon shall constitute his decision which shall be final and conclusive on the parties hereto subject to appeal by the contractor within thirty (30) days therefrom as provided in the "Disputes" Article herein.

ARTICLE 6. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact which may arise under this contract, or disputes which may arise under the plans and specifications attached hereto, and which are not disposed of by mutual agreement, shall be decided by the Contracting Officer, who shall reduce his decision to writing and send by registered mail, return receipt requested, a copy thereof to the Contractor at his address shown herein. Within 30 days from the mailing thereof the Contractor may appeal in writing to the Chief of Engineers, whose written decision thereon, or that of his designated representative or representatives, shall be final and conclusive on the parties hereto unless, within 30 days after the receipt thereof by the Contractor, he appeals in writing to the Secretary of the Army, which appeal shall operate to vacate said decision of the Chief of Engineers. If the dispute is determined by the Secretary of the Army, his written decision, or that of his designated representative or representatives, shall be final and conclusive upon the parties hereto. The Chief of Engineers or the Secretary of the Army may designate an individual, or individuals, other than the Contracting Officer, or a Board, as his authorized representative to hear and determine appeals under this Article. In any proceedings under the provisions of this Article, the Contractor shall be afforded an opportunity to be heard and offer evidence in support of his appeal. Pending decision of a

dispute hereunder, the Contractor shall diligently proceed with the performance of this contract. Any sum or sums allowed to the Contractor under the provision of this Article shall be paid by the Government as part of the cost of the articles of work herein contracted for and shall be deemed to be within the contemplation of this contract.